
THE
DOCTRINE
OF
LIBELS, &c.

[Price One Shilling.]



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THE
DOCTRINE
OF
LIBELS

AND THE
DUTY of JURIES
FAIRLY STATED,

BY

The AUTHOR of the EXCISE SCHEME dissected, &c.
The fatal Consequences of MINISTERIAL IN-
FLUENCE, &c. and several other Pieces in Fa-
vour of our CONSTITUTION.

Pro Rege saepe, pro Republica semper.

BUCH.

L O N D O N :

Printed for M. COOPER, at the *Globe* in *Pater-*
noster Row. 1752.

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DOCTRINE
OF
LIBELS
AND THE

DUTY OF JURIES
FAIRLY TO TRY



The Author of the *Law of Libels* is
The first Lord of the Treasury in
Parliament, &c. and several other Lords in Pa-
rliament of our Constitution.

Printed by J. G. & J. H. B. in the Strand
London.

LONDON:
Printed for M. Cooper, at the Globe in Pall-mall
1795.



P R E F A C E.

 HAVE in the Title Page mentioned two Pamphlets wrote by me some Years ago, upon two very remarkable Occasions, not with any Design to recommend the following Sheets to the Perusal of the Publick, because the Subject is so interesting that, I hope, it will recommend itself; but with a Design to revive the Consideration of *those two Pamphlets*, which I think the more necessary, as some Gentlemen who in those Days were professed Patriots, are now become Advocates for ministerial Influence, and for extending it by every Method that can be devised, because I suppose, from their having a Share of the Profits, they vainly imagine they have a Share of the Influence. Even the *Excise Scheme*, which then raised such a Ferment over the whole Nation, they now talk of as a necessary Scheme for improving their now Darling, *The Publick Revenue*; and declare themselves most sincere Penitents, for having opposed the Establishment of a Regulation, which would have brought Elections
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in all our Cities, Boroughs, and Cinque-Ports, so much under the Direction of the Administration.

This gives me some Ground to suspect, that *the same Scheme*, or something like it, will be soon attempted; and indeed, if the People of this Kingdom had no Liberties to contend for, if they were already the abject Slaves of absolute and arbitrary Rule, there would be no great Reason for opposing any Extension of the *Excise Laws*, which our Ministers might think necessary for their Purpose. If this be already our unhappy Condition, it is, I shall grant, some Excuse for the Gentlemen who now so openly declare against their former Professions. But if this be already our Condition, I am very sure, we can have no Occasion for the Raree-Shew of a Parliament, or the Farce of any popular Election; for the History of the *Roman Empire* will convince every Man who attends to it, that absolute Power, supported by a corrupt Parliament and a mercenary Army, is of all others the most oppressive, and the most whimsically Cruel.

A Diet or Parliament is far from being like those innocent Drugs often prescribed by Physicians, to conceal their own Ignorance, or to swell the Apothecary's Bill, which neither do Good nor Harm; for if this Political Drug does no good, it is necessarily the Cause of Mischiefs which are not only terrible but innumerable; and one of these, though suspected by

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by few, is it's being the Cause of those vexatious Taxes which in this Country we call *Customs* and *Excises*. Some Readers may be surprized at this, but it is true. A sole and arbitrary Monarch whose Will is a Law to his Subjects if he be a Man of true Wisdom and Penetration, or advised by such, will consider, that the Riches of his Subjects are his Riches, because he can command whatever Share thereof he stands in need of. He will farther consider, that Commerce, Manufactures and Industry enrich his Subjects; therefore he will not impose *Customs* upon his own Subjects, because they are vexatious to the Merchant, and consequently prevent or destroy Commerce; he will not impose *Excises*, because they are vexatious to the Industrious, and consequently prevent or destroy Manufactures and all Sorts of Domestick Produce; nor will he tax the Necessities, or even the Conveniences of the Poor, because it is they that labour and toil: But as he is not obliged to court the Favour of the Rich, he will make them out of their overgrown Revenues or Profits, contribute what is necessary for the Support of the Government.

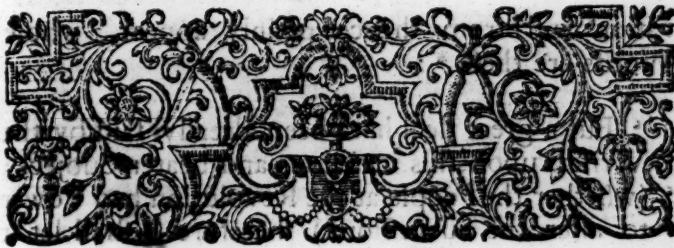
On the other Hand, an absolute Monarch who is obliged to have the Consent of a *corrupt* Senate or Parliament, must obtain that Consent by Violence or Bribery, and the less of either he makes use of the better; therefore even though he could command he must court the Consent of that Senate or Parliament, which always must
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consist of the chief rich Men in the Country ; and as such Members cannot be supposed to have any *Publick Spirit*, they will endeavour to save themselves by loading the Poor, and the Industrious with *Customs* and *Excises*.

Thus I think it is evident, that *Customs* and *Excises*, when they become very numerous and oppressive upon the industrious Merchant and laborious Tradesman, must be allowed to be the true Offspring of absolute Power supported by a *corrupt* Senate or Parliament ; and if ever this should come to be the Fate of this Country, the wisest Thing the People could do, would be, to enable their Sovereign to govern without any Parliament at all, rather than suffer themselves to be amused with the Shadow of Liberty, as the *Roman People* were, until they and their Sovereign together become the Prey of some foreign Barbarians. This, I hope, our late Converts to the *Excise Scheme* will maturely consider ; for if ever this fatal Change should happen, few or none of them would, I believe, long continue to enjoy the lucrative Employments they at present possess ; and from what has happened lately in some neighbouring Countries, where undisguised absolute Power prevails, our Lawyers may see that the Profits of their Trade depend chiefly upon the Preservation of our happy Constitution, according to its original and fundamental Plan.

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THE
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HAVING of late heard several warm Disputes in Coffee-Houses and other Public Places about Libels, and in these Disputes some Doctrines advanced, which I thought not only erroneous but of dangerous Consequence to our Constitution, it set me upon reading over again, and reconsidering what has been wrote upon that Subject; and as these dangerous Doctrines are, I find, generally supported by our Lawyers, who by weak People may be thought best acquainted with the Nature of our Government, I thought it might be some Service to my Country, to methodize and publish the Result of my Inquiries, as the Justness of Dr. *Swift's* Obser-

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vation will from thence plainly appear, whose Words are these * :

‘ But a great deal hath been already said by the
 ‘ Writers upon this invidious and beaten Subject ;
 ‘ (whether the People at the Revolution had Power
 ‘ to alter the Succession?) therefore I shall let it
 ‘ fall ; though the Point is commonly mistaken,
 ‘ especially by the *Lawyers, who of all others seem*
 ‘ *least to understand the Nature of Government in ge-*
 ‘ *neral* ; like Under-workmen who are expert
 ‘ enough at making a single Wheel in a Clock,
 ‘ but are utterly ignorant how to adjust the several
 ‘ Parts, or regulate the Movement.’

And indeed, it does appear from our History, either that our Lawyers have all along been ignorant of the true Nature of our Constitution, or that some of the Chief of them have upon all Occasions been ready to sacrifice it to their selfish Views of Preferment ; for as often as any Question has been put to them by an arbitrary Court, they have generally given their Opinion against the Constitution. Witness their Answers to the Queries put to them by *Richard the Second* and his Ministers in 1387. And though most of them were soon after hanged or banished, as they deserved, for these Answers ; yet again, in the same Reign, another set of our Lawyers declared in Parliament, *That when the King proposed any Articles to be debated in Parliament, it was high Treason to bring in others before the King's were first dispatched* ; and that Parliament being a Parliament returned and influenced by Bribery and other illegal Practices, they adopted and established this Opinion ; but the Fate of that

* Sentiments of a Church of *England* Man.

unfortunate Prince will, I hope, be a warning to all future Sovereigns of this Kingdom, not to take the same Methods for having a Parliament at their Devotion, nor to depend upon the Opinion of Mercenary Lawyers who, from a strange Custom, are bred to think it no Crime, to plead the Cause of Fraud and Oppression ; and our State Trials will fully evince, whether our Judges have upon all Occasions been what they ought to be, *of Counsel with the Prisoner at the Bar.*

But to come down to more modern Times, did not our Lawyers, under another unhappy Prince, *Charles the First*, give not only their Opinion, but a most solemn Judgment, in favour of *Ship-money*? and under a Third, *James the Second*, did they not give their Opinion in favour of *the King's dispensing Power*? 'Tis true, in the two last Cases some of the Judges had Integrity enough to give their Opinion against the Court ; and for the Honour of the Fair Sex I think myself bound to take Notice, that one of the Judges was, contrary to what he had resolved, induced by his Lady to declare according to his Conscience, and against *Ship-money*. But at both times the Bar generally declared in favour of the most profitable Opinion ; and even at this present Time, they are by their Doctrines endeavouring to undermine, or render uselefs, that last Ressource of *British Liberty, a fair Trial by an Honest and resolute Jury.*

Therefore, I hope, it will never in this Country be admitted as a Rule of Faith, that our Lawyers are infallible in Points which relate to our Constitution ; and even in Matters of Law, they may be mistaken in Cases where they have no Precedent to direct them, much more in Cases where they

have unreasonable or absurd Precedents, for authorising that Opinion which corresponds most with their Interest, and of Course with their Inclinations ; because the Law, in this Country, though the best and most reasonable in the World, if it were not depraved by the Practice, is neither studied by the Students, nor treated by the Writers, as if it were a Science : Most of the latter have wrote their Books in an alphabetical not a scientific Method ; and many of the former think only of studying what is Law, not what is the Reason of the Law in any Case whatever. If you ask a Lawyer of this Kind, why by our Law a Father does not succeed to his Child's Land Estate, he will either refuse to give you any Reason, or he will perhaps, with Sir *Edward Coke*, and the other old Oracles of the Law, tell you, *that Land Estates are heavy and cannot ascend* ; whereas a Gentleman who has studied the Law in a rational way will tell you, that as Children are so much in the Power of their Parents, and were more so of old than now, our Ancestors were afraid, that if the Father had a Right to succeed to his Child's Land Estate, it might tempt him to destroy his Child, therefore they made our Law in this respect different from the more modern *Roman Law*, and the Laws of most if not all the Countries in *Europe* ; but as there were then no Personal Estates of any great Value in the Kingdom, the Father's Right, as next of Kin, to his Child's Personal Estate was not deemed to be of any dangerous Consequence to the Child, and therefore not abolished.

I have mentioned this only to shew, that when our learned Dons of the Law design to give a Reason, we are not blindly to adopt that as the best or the only Reason that can be given ; and
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I shall presently shew, that they are not much happier in the Reason they have given for making a Libel against a Private Man a Public Crime that may be prosecuted by Indictment or Information, which brings me to what I design as the Subject of this Treatise.

A Libel therefore, is by our Lawyers defined to be, a malicious Defamation of any Person expressed either in Printing or Writing, Signs or Pictures, to asperse the Reputation of one that is alive, or the Memory of one that is dead. And the Author and Publisher of such a Libel may be prosecuted either by Indictment or Information at the Suit of the Crown, or by an Action of the Case at the Suit of the Party injured.

The Reason assigned by our Lawyers why such an Offender may be prosecuted by Indictment or Information at the Suit of the Crown, is because it may be the Cause of Bloodshed or a Breach of the Peace. If this were the true and only Reason, the Conclusion would be, that a Libel is not a *malum in se*, or of itself a Crime, but that it becomes so by the ill Consequence it may be attended with; and another Conclusion would be, that any Sort of provoking Language not only might, but ought to be punishable by Indictment or Information, because it is more apt to be the Cause of Bloodshed or a Breach of the Peace, than the most infamous Libel that was ever published; whereas, such Language is not allowed by our Law to be so much as an Excuse, or even an Alleviation for an Assault and Battery, which I am sorry it is not; for if a proper Regard were in all Cases had to the first Affront even by Language, it would be the Cause of Mankind's observing more strictly that Precept
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which is so strongly recommended to us by Divine Authority, *To Bridle the Tongue* ; and it would be a Step towards putting an End to the pernicious Practice of Duelling; which I am far from justifying, but still I must say, that it makes Gentlemen more civil and complaisant in their Conversation and Dealings with one another, than perhaps they would otherwise be; and we cannot expect, that ever it will be disused, until the Law takes Notice of him who gives the first Affront, either by Language or otherwise. But if a Law were made, in Case of Duelling, to hang without Mercy, the Man who gave the first Affront, or refused to accept of a reasonable Satisfaction, and to pardon the Man who received the Affront, or who offered all reasonable Satisfaction, even supposing he should kill his Antagonist in a Duel, I am persuaded, we should very rarely hear of any such thing.

To return to the Case of Libels, it is plain from what I have said, that the Reason assigned by our Lawyers is not the true Reason, why a Libel against a Private Man is made liable to be punished by an Indictment or Information at the Suit of the Crown. The true Reason is, because with many Men (with all it ought to be) Character is more dear than Life itself, and with most Men, I hope, it is more dear than any Property they possess or can acquire. Therefore to attack a Man's Character, is as great an Injury to him as to attack his Person or his Property ; consequently a Libel is a *malum in se*, a Crime in itself, without any Regard to the Consequences it may produce ; and, in my Opinion, it is equally heinous with that of Robbery or Theft, I had almost said with Murder itself ; the only Difference being in this, that a Man's Life once taken away cannot be re-
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stored by the most sincere and hearty Repentance of the Criminal, but his Character may. And such Regard the *Old Romans* had to a Man's Character, that by their Law of the *Twelve Tables* a defamatory Libel was punished even with Death.

We may now easily see the Reason why a Libel against a private Man is made punishable by Indictment or Information; for as the King is the Protector of every Subject's Person and Property, so he is the Protector of every Subject's Character. And the Reason why provoking Language is not made punishable in the same Manner, is because it is generally the Result of Heat and Passion not of Malice, and consequently does not affect the Character of the Person to whom it is given, so much as a deliberate and malicious Publication of a Libel; though, as I have said, some Regard ought to be had to it, when a foul-mouthed Fellow comes to seek Redress by an Action of Assault and Battery.

Now an Indictment or Information being prosecuted by the Crown alone, the Person injured is not a Party to the Suit, nor supposed to be present at the Trial; therefore in such a Case the Defendant is not allowed to justify, by bringing Witnesses to prove the Facts set forth in the Libel he has published; for the Law very justly will not allow a Man's Character to be inquired into, when he is neither present, nor has had any Notice to vindicate his Character. This has led our practical Lawyers into another Mistake, for not considering the Reason why in such a Case the Defendant cannot examine Witnesses for proving the Facts alledged in his Libel, they have laid it down as a general Rule, that in all such Cases, *it signifies nothing*

nothing whether the Matter of the Libel be true or false. I shall grant that if the Trial were not to be by Jury, this would be a general Rule; but no such Rule would ever have been introduced, if our Prosecutions and Trials had not been by Jury; and since the modern Method of Prosecution by Information, the Rule of not allowing the Defendant leave to justify is a little hard; for he now runs a great Risk, and must be at a great Expence, before he can be justified by a Petty Jury; whereas, were the Prosecution to be only by Indictment, the Grand Jury would certainly reject the Indictment, if they of their own Knowledge knew the Truth of what was pretended to be a Libel.

I therefore say, that when the Prosecution is by Information, it is a little hard not to allow the Defendant to justify by examining Witnesses; for the Judges who in this Country are Judges of the Law only must presume every Man to be Innocent until he is proved Guilty by the Verdict of a Jury, and if no Proof is to be admitted of the Facts with which a Man is charged in a Libel, the Facts must by the Judges be presumed to be false; but when we consider the Style or Words of every such Information or Indictment, and that the Trial is to be by a Petty Jury, such a Maxim as our Lawyers insist on implies an Absurdity which, whatever Lawyers may do, no Man of common Sense will admit of; for in every Information or Indictment for a Libel against a private Man, the Libel is charged to be *False, Scandalous, and Malicious*; and every one knows, that a Jury has as yet a Power to bring in their Verdict without Evidence or even against Evidence; because from their own Knowledge they may either convict or acquit. Consequently, to tell us that it signifies
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nothing, whether the matter of the Libel be true or false, is to tell us, *that a Jury must upon their Oaths declare that to be false, which in their Conscience they are convinced is true.*

As this is such a glaring Absurdity, we must admit that tho' the Defendant be not allowed to bring Witnesses for proving scandalous or perhaps criminal Facts against a Man who is absent, and no way called upon to defend his Character, yet the Jury may and ought to consider, whether they have good Reason to be convinced, either from their own Knowledge, or from the general Character of the Man, *that the matter of the Libel is true; and we know, that in a famous Case within our Memory, it was allowed by both Houses of Parliament, that an Evidence may be sufficient for convincing tho' it be not sufficient for convicting.* This I shall grant, is a dangerous Doctrine when pleaded for declaring a Man guilty of a heinous Crime, and subjecting him to a grievous Punishment; but when pleaded for acquitting a Culprit, it is so far from being Dangerous that it ought to prevail; for in the Case of a Libel, the whole of the Crime lies in the matter therein set forth being false and of a scandalous Nature: If the Facts be true, there can be no Malice implied, and if they be not scandalous, they cannot injure a Man's Character. But if the Facts be false and scandalous! If the Jury be not in their Conscience convinced of the contrary, they ought to imply Malice: They ought to convict; and, in my Opinion, the Court cannot pass too severe a Judgment.

I say, that if the Jury be not in their Conscience convinced of the Truth of the Facts from their own Knowledge, or from the general Character of the Person accused of Libelling, and the Person pretended to be libelled, they ought to imply Malice, tho' no Circumstance be proved from which it may be inferred; because we are to suppose every Man Innocent unless we know, or hear it proved that he is guilty; but when the Jury know from their own Knowledge, that the Person pretended to be libelled has been guilty of those very Facts with which he is charged, or if from the Character of the Person libelled they think they have Reason to believe, that he has been guilty of those Facts, and that from the Character of the Person accused of Libelling, they have Reason to believe, he would not have charged any Man with such Facts unless he had known him to be guilty, they ought to bring in their Verdict *Not Guilty*.

This is a Latitude which every Jury ought to take, and a Latitude which will be of great Advantage to Society; because it will be an Inducement for every Man to endeavour to preserve a good Character in his Neighbourhood; and it can be attended with no bad Consequence, because the Expence and Trouble a Man is put to by defending himself against an Indictment or Information, and the Risk he runs of being convicted, by not being allowed to prove what he sets forth in his Libel, will always be a sufficient Bar against the Publication of any Libel that is really False, Scandalous, and Malicious: I must therefore think, that in the Case of a Libel tried some few Years since, where the Jury from their own Knowledge

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Knowledge of the Person pretended to be libelled, acquitted the Defendant, by bringing in the general Verdict, *Not Guilty*, tho' the Matter of the Libel was Scandalous, and the Publication fully proved: I say, I must think, that the Jury in that Case understood the common Law, which is common Reason, better than most of our Lawyers.

I know it is a Question much agitated among Lawyers, especially the Civilians, whether the Truth of a Libel can excuse the Publication of it; and the Authority of *Cicero* is quoted for the Negative, who in his Treatise *de Republica* says, *Nostræ 12 Tabulæ. cum perpauca res capite sanxissent, in his hanc quoque sancendam putaverunt, si quis carmen condidisset, quod Infamiam faceret, flagitiumve alteri. Præclare. Judicijs enim ac magistratuum disceptationibus legitimis propositam vitam, non Poetarum ingenijs, habere debemus: Nec probum audire, nisi ea lege, ut respondere liceat, & Judicio defendere.* And Lawyers are too generally of Opinion, that the Truth of a Libel cannot so far justify the Publication of it, as to free the Publisher from all Punishment; because, say they, if a Man has been injured he may have and ought to seek Redress in a legal Way; and public Crimes ought to be prosecuted in a public Manner before the proper Magistrate.

But to this I answer first, that in the *Roman Law* there are several Passages which seem to be opposite to this Opinion, for *Paulus* says, *Eum qui nocentem infamavit, non esse bonum æquum ob eam rem condemnari; peccata enim nocentium nota esse, & oportere & expedire, Pandect. Lib. 47. Tit. 10. Leg.*

18. *in pr.* And the Emperor *Constantine*, in one of his Rescripts says, *Iustissimos & vigilantissimos iudices publicis acclamationibus collaudandi damus omnibus potestatem, ut honoris eis auctiores proferamus Processus: et e contrario injustos, & Maleficos querelarum vocibus accusandi, ut censura nostrae vigor eos absumat. Nam si verae voces sint, nec ad libidinem per clientelas effuse, diligenter investigabimus: Praefectis praetorio, & Comitibus, qui per provincias constituti sunt, provincialium nostrorum voces ad nostram scientiam referentibus. Cod. Lib. 1. Tit. 40. Leg. 3.* And even *Cicero* in the above Quotation, does not say, that a Man accused of publishing an infamous Libel may not justify himself by proving, in a judicial Manner, what he has set forth in the Libel, for surely he could not say, it would be *Præclare*, to hang a Man for calling a Thief a Thief, or a common Strumpet a Whore. He rather seems to point at Satyrical Wits or Poets, who availing themselves of innocent human Foibles, endeavour to make a Man ridiculous amongst his Friends and Countrymen; and when any certain Man is in such Pieces so particularly pointed out, that every one must see, it is he and can be no other, that is aimed at, the Truth of such Foibles cannot be allowed as a Justification of the Author.

In the second Place I answer, that great Frauds and grievous Injuries may be so cunningly committed, as not to be exposed to any Prosecution at Law, either in a criminal or civil Method; and even heinous Crimes may be committed in such a hidden Manner, as to prevent its being possible to bring a legal Proof: A whole Neighbourhood may be convinced of a Man's Guilt; and yet not one of them able to prove it. Such Offenders, such Criminals

minals can be punished only by that Method which we call Libelling; and when a Man is attack'd in this way, he ought to be left to depend for Redress upon the Judgment of an honest Jury of Neighbours, who will consider both his Character and the Character of the Person who published the Libel against him.

And in the third Place I answer, that whatever was the Law amongst the *Romans*, whatever is the Law in any other Country, in this it is admitted that the Truth of what is called a Libel shall justify the Publisher, in every Case where the Person said to be libelled can appear and vindicate his Character; for if he should bring his Action against the Publisher, the latter may then justify, and may bring Witnesses to prove the Truth of what is set forth in the Libel: Nay, even in that sort of Action called *Scandalum Magnatum*, tho' brought at the Suit of the King as well as the Party injured, the Defendant is allowed to justify, and to bring Witnesses for proving the Truth of what he has asserted. From these two Cases I wonder our Lawyers did not find out, that if upon an Indictment or Information for an infamous Libel, the Defendant was not allowed to examine Witnesses to the Truth of what he had asserted, it was not because in such a Case it signified nothing, whether the matter of the Libel was true or false, but because the Person said to be libelled was no way a Party to the Suit, and consequently could not be supposed to be ready to vindicate his Character; yet still, as I have said before, the Jury are obliged to consider the matter of the Libel; and
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ought not upon their Oaths to declare that to be false, which in their Conscience they are convinced is true:

The Absurdity of this even our Lawyers seem now to be sensible of, and to get rid of it they have of late advanced a new Doctrine. Juries, they say, are Judges of Fact only, not of Law, therefore if it be proved that the Defendant was the Author or Publisher, they ought to find him Guilty; because the Question, whether it be a Libel or no, is Matter of Law, of which they are not proper Judges; or at least, the Jury ought to bring in a Special Verdict, finding the Publication proved, and leaving it to the Court to decide whether what was so published was a Libel or no. It is strange that a byass to Court Favour, or a Dread of that only Scourge of high Criminals and cunning Rogues, a *Libel*, should lead our learned Lawyers into such gross Mistakes: Juries, I shall grant, are proper Judges of Fact only; but wherever a Fact in itself innocent becomes Criminal by Circumstances, or where a Fact in itself Criminal becomes more or less so by Circumstances, all those Circumstances are Facts, which the Jury may and ought to judge of. They are impannelled to try between the King and the Culprit; and they are sworn, that they will well and truly try: can they be said to have done their Duty, or to have fulfilled their Oath, if they leave those Circumstances which make an innocent Act a Crime, to be tried by the Court?

In a Trial for Murder, the Killing is the principal Fact, and the Malice forethought must appear

pear from the Circumstances ; for neither the Court nor the Jury can peep into the Prisoner's Breast, to see if there was any Malice there. These Circumstances are Facts which the Jury are and must be Judges of ; and from their own Knowledge they may know Circumstances that may render the Circumstances proved more or less aggravating ; for where an Act of the Mind makes the Crime, that Act must appear from Circumstances : Statute or Custom may direct what Circumstances shall imply an Act of the Mind, of which the Court is to inform the Jury ; but the Jury are the only Judges whether such Circumstances are proved ; and where neither Statute nor Custom directs, the Jury are left at large to determine according to the best of their own Judgment. Is a Jury upon every Trial of Murder to find the Killing proved, and to leave it to the Court to decide whether the Circumstances were such as made the Killing Murder, Manslaughter, *per Infortunium*, or in Self-Defence ? Or are they to return a Special Verdict, finding the Killing and all the particular Circumstances ? If they were, a Verdict would often be of much greater Length than the Indictment, and the Jury might starve before they could agree in drawing it up in its proper Form. They are therefore never to return a Special Verdict ; but when they find it impossible for them after the most mature Deliberation to determine, whether there was any Malice forethought or no ; for if they should be of Opinion, that from the Circumstances proved no Malice appeared, or if from their own Knowledge they should think, that there was no Malice, and yet should return a Special Verdict, and in Consequence thereof
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the Prisoner, after Sentence of Death passed upon him, should be hanged, they would be guilty of Murder as well as Perjury.

Suppose a Gentleman in a private Company should for Argument's Sake, and by way of Diversion only, undertake the negative Side of the Question mentioned in my Quotation from Dr. *Swift*, and in the Warmth of the Debate should say, that the Pretender had a Right to our Crown; and suppose that unluckily one of this Company was the Informing Tool of a Minister who had a Pique at this Gentleman: Such Cattle, like Spaniels, are fond of getting any thing to carry: He would immediately run to his Master with the Tale: An Information would be granted upon his Oath against this Gentleman, for maliciously and directly affirming by advised Speaking, that the Pretender had a Title to our Crown, against the Statute 4. *Anne*, Chap. 8. Upon this Trial the Jury, according to the modern Doctrine, are to judge only, whether such Words were spoken, which none of the Company could upon Oath deny; for it would be said, that whether they were spoken maliciously, directly, and advisedly, was matter of Law, which the Jury were to leave to be determined by the Court; and thus under an over-bearing Minister, and Judges that might be bullied, neither of which indeed we are at present in Danger of, an Innocent Man might be brought into a *Præmunire*; for such Words when spoken only for Argument's Sake, and by way of Diversion, are in themselves quite innocent; but an honest resolute Jury would certainly consider all the Circumstances, and unless they thought that the Words were
spoken

spoken maliciously, directly and advisedly, they would bring in their Verdict, *Not Guilty*; because it is this that makes the Crime, and it is the Crime not the single Fact of Speaking that they are to try.

So in a Trial for an infamous Libel, it is the Falshood and Malice forethought that makes the Crime. Writing, Printing, Publishing, are Facts intirely innocent, but become criminal by being done with a malicious Intention to hurt the Character of another Man. It is the Crime, not the innocent Act which the Jury are to try; but whether there was any malicious Intention or no, can be known only from Circumstances. These Circumstances must all be Facts, and are the chief Facts to be judged of by the Jury. If there be no Confession or Declaration of Malice proved, it can only be implied, and can be implied from nothing but the Matter contained in the Libel: If that Matter be not scandalous: If the Man be not thereby charged with some scandalous Action or Behaviour, no Malice can be implied; for there can be no malicious Intention in charging a Man with an indifferent or laudable Action, unless by way of Irony, and then the Charge is supposed to be the contrary of what is expressed: If the Matter of the Libel be true, no malicious Intention can be implied: On the contrary, it might have been published with a good Intention, to put Mankind upon their Guard, against such a cunning and dangerous Rogue. If the first Trick committed by the famous *Stroud* had been published, it might have prevented many an honest Tradesman from being afterwards cheated by him. And a bad In-

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tention is never to be presumed, when a good one may be supposed, and no Malice is proved.

I hope I have not, by mentioning *Stroud* as an Example, exposed myself to the Danger of having an Information moved for against me, as the Publisher of an Infamous Libel ; but I would have those who have published any Accounts of him, take Care of themselves ; for I have read amongst the old Civilians, that an Account of the Crimes for which a Man has been prosecuted and punished is a Libel for which the Publisher ought to be punished ; and I have heard some of our modern Lawyers say, that the Truth of a Libel rather aggravates than alleviates the Crime of publishing it. The Truth is, that he who publishes the Crimes for which a Rogue has already suffered, is destitute of the Excuse one has for warning Mankind against a Rogue whose Villany has not yet been fully detected ; for in this I must still think, there is some Merit.

Suppose a Man should publish that ——— is *a Tale-bearer and Informer* : He would probably soon have an Information brought against him, for publishing a false, scandalous, and malicious Libel ; and this Consequence would be the more certain the more Truth there was in the Libel : Suppose this Information should come to be tried by a Jury, most of whom had certain Knowledge of the Truth of the Matter of the Libel : And suppose the Publisher should avow the Publishing, but insist upon, and offer to prove the Truth of what he had asserted : We all know, that he neither could nor would be admitted to enter into such a Proof, for the Reason I have
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given. But could such a Jury find the Publisher guilty? Could they in Conscience return a Special Verdict, finding the Publisher guilty of the Publishing, and leaving it to the Court to determine whether it was a Libel or no? Upon such a Verdict, every one knows, that the Court must condemn, because if false, it would certainly be a most malicious Libel, and the Judges must suppose it to be false, because there was no Proof before them of its being true. The certain Consequence then would be, that the Publisher would be fined and imprisoned for having warned Mankind to avoid such a noxious Animal. And if such a meritorious Publisher should die of the Goal-Distemper, I will aver that the Jury and the Jury alone, would be guilty of Perjury, wilful Murder, and the blackest Ingratitude. Of Perjury, because they had not fulfilled their Oath as Jury-men: Of Murder, because it is a Maxim in Morality as well as Law, that *Qui non prohibet quando prohibere potest et debet, mandasse præsumitur*; and of Ingratitude, because they had not, when they might have saved a Man who had served his Country.

As the Judges are thus upon a Special Verdict, by our Law, under a Necessity to pass Judgment against the Publisher of a Libel, let the Matter of it be never so notoriously true, the Jury should be the more cautious of returning such a Verdict, because it is in Effect the same with the general Verdict, *Guilty*; for I must still insist upon it, *that a true Libel is not a false Libel*, and that if the Matter of it be strictly true, no malicious Intention is to be presumed. Therefore if the Jury, or any two or three of them,

know the Publisher to be an honest good-natured inoffensive Man, and that the Person pretended to be libelled is generally suspected of being guilty of such Actions or of such a Behaviour, I must think, that they are sufficiently warranted to return their Verdict, *Not Guilty*, notwithstanding the Publication's being confessed or fully proved; because the Publication is not the Fact they are to try, but the Fact of its being a false, scandalous, and malicious Publication.

But so absurd are some of our Lawyers become, as to say, that the Word, *False*, is only a Word of Form, and not material to be in an Information against an infamous Libel. It is, they say, like the Words, *with Force and Arms*, which their ridiculous Adherence to old Forms, still continues to put into Indictments where they are inconsistent with common Sense, and are Words which neither the Court nor the Jury have any thing to do with. And I do not know but that, by and by, they may say that the Word, *Scandalous*, is likewise a Word of mere Form, or at least a Word which the Jury have nothing to do with, because the Question, whether the Matter of the Libel be scandalous or no, is a Point of Law which the Jury are to leave to be determined by the Court. In Consequence of such Doctrines a Man may hereafter be fined and imprisoned for publishing, or for writing to a supposed Friend, that a Great Lord or Minister went out of Town, or arrived in Town, such a Day. And by the same Consequence a learned Mathematician and Astronomer, who asserted the true System of the Universe, might be convicted and punished upon the Statute 9 & 10 W. 3. Ch. 32.

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for denying the Holy Scriptures to be of Divine Authority, in case we had such a bigotted King upon the Throne, and such pliant Judges upon the Bench, as, I hope, we shall never again have in this Kingdom.

In short, from such Doctrines we may see, that Lawyers aim at stripping their Country, that is to say, our Juries, of all real Power, and Ingrossing the whole to themselves; and from the short Account I have given of their Behaviour in time past, we may judge of it in time to come, were they once possessed of the whole Power of trying and condemning their Fellow Citizens: I say condemning, for should we ever have such Judges upon the Bench, as we had in any of the three Reigns I have mentioned, I fear, they would rarely acquit, where the Crown or the Minister was the Prosecutor. Should this ever come to be the unhappy Condition of the People of this Country, I should rather live in *Turkey* than here; because were I to die, I should chuse to die by the Bowstring, at the arbitrary Command of a *Sultan*, or *Sultana*, than be plagued with going thro' all the affected Forms of Justice. But I hope, our Juries will take Care, not to allow themselves to be made meer Cyphers in the Trial of their Countrymen; for I must observe, that if ever any future Sovereign should be able to get such Parliaments as King *Richard* the II^d's *Sbrewsbury* Parliament, the Clause in the Act of Settlement for our Judges Commissions being *quandiu se bene gesserint*, would be no Security to the Subject; because by that Clause the whole Twelve might be removed upon an Address from
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both Houses; and such an Address would readily be granted by such a Parliament.

And I must farther observe, that in all Ages and Countries, the Lawyers have shewn themselves violent Enemies to every thing that had the Appearance of a Libel, the reason of which may be easily guessed at; for tho' I know many of them in this Country that are Men of consummate Honour and Integrity, yet it is to be feared, that too many are more careful to gain and preserve the Character of an expert Lawyer or powerful Orator, than that of an honest Man; and that *Cicero* himself was one of this Character, has been insinuated by a late Writer of the highest Rank*. Such Men do not like that their Character should be brought in question before a Jury of honest Neighbours, in case of a Libel's being published against them; and as they know better than other Men how to offend within the Limits of the Law, they think, that if they can prevent any Account of their Frauds being published, they may guard against any legal Prosecution.

The only other Point relating to Libels against private Men which I have at present any Occasion to consider, is that of the Certainty of the Person said to be libelled: This even the Lawyers all agree to be absolutely necessary as a Foundation for a Prosecution; and whether any certain Person be pointed at by the Libel, is a Question which the Jury are the sole Judges of.

* Supplement to the Memoirs of the House of Brandenburg.

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They must therefore be convinced by proper Proofs, that the Libel was designed against some certain Person, natural or political, or some certain Number of Persons ; for if the Libel be so general, or conceived in such dark Terms, that it may have been designed against another, or against others, than that Person, or those Persons mentioned in the Indictment or Information, the Jury cannot find the Publisher guilty, unless it should appear in Proof, that he had by some Confession or Declaration explained what he had so generally or so darkly expressed in his Libel ; for however scandalous or criminal the Facts mentioned in the Libel may be, if it is neither said nor insinuated that they were committed by any certain Person, or any certain Number of Persons, some way in the Libel, or by some previous or future Declaration, described, no Man's Character can be injured, and where there is no Injury, there can be no Punishment. In the Application of what is said to be a Libel, the Jury should therefore be cautious of allowing themselves too great a Latitude ; for otherwise it would be dangerous either in Sermons, Satyrs, Sonnets, or Comedies, to reprove or expose any of the prevailing Vices of the Age we live in. The very first Song in the *Beggar's Opera* might have been deemed a Libel ; and the ingenious Author might have been prosecuted for publishing a false, scandalous, and malicious Libel against that honest useful set of People, called *Courtiers*.

I have hitherto treated of private Libels, or Libels, which are supposed to be published against private Men, but shall now proceed to
examine

examine publick Libels, or Libels against the State, which have always the Word, *Seditious*, added to False, Scandalous, and Malicious. These False, Scandalous, Malicious, and Seditious Libels may be either against the King, or against some in Authority under him, or against the Measures of the Administration. As to Libels against the Person of the King, or against his personal Conduct, they are in the highest degree Criminal, and must always be supposed to be False both by Judge and Jury; because his Person is Sacred, and our Constitution does not admit, that he can ever do any Wrong. But as to Libels against those in Authority under him, or against the Measures of the Administration, we ought to consider, that there is a very great Difference between the Form of our Government, and that of most of the other Governments in the World: In absolute Governments, whether monarchical or aristocratical, where the People have no Share in the Government, an Address, or a Complaint to the People against any publick Measure or Magistrate, which is generally the Purport of every such supposed Libel, must be Malicious, and Seditious, if not Treasonable; because the People can no way contribute towards Redress, but by an Insurrection or Rebellion; therefore to apply to them by any such Publication, can be with no other Intention than that of spiriting them up to take Arms against the Government. Whereas, in this Country, where the People have still such a large Share of legal Power, a Man who has been oppressed by any Minister or high Magistrate, or who thinks that the Measures pursued by the Administration tend to the Ruin

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or enslaving of his Country, may Address himself to the People with a very good and a legal Intention. And if he no way misrepresents the Case: If he charges nothing but what is strictly true, so far from being punished as a Malicious and Seditious Libeller, he ought to be rewarded as a bold and resolute Asserter of the Liberties and Privileges of his Country. Even the King himself ought to reward him; for it is every King's Duty, and he will at last find it his Interest, as it was the Emperor *Constantine's*, in the Law above-mentioned, *voces Provinciarum diligenter investigare.*

I have said that the People in this Country have still a very large Share of legal Power, and when I say so, every one must suppose that I mean the Power they have of chusing their Representatives in Parliament; and the Power those Representatives have of enquiring into the Measures of an Administration, of addressing the King to dismiss any Subject from his Councils and Presence, and of Impeaching, if they see Cause, the highest Subject in the Kingdom. But besides this, the People have another Power: They have a Power of Petitioning the King, and both or either House of Parliament, against any Measure they think destructive to the Interest of the Nation, or against any Minister or Magistrate who makes an oppressive Use of the Authority vested in him by his Sovereign; in short against any thing they think a publick Grievance. Surely then the People may without any malicious or seditious Intention be instructed when they ought, and how they may make the proper and legal Use of these Powers; and in order

der to Instruct them, it is absolutely necessary to lay the Case fairly and fully before them. Such a Case may by Ministers and Magistrates, especially the guilty, be called a False, Scandalous, Malicious, and Seditious Libel; but if the Facts be all truly stated, without any false Gloss or Misrepresentation, and without any Indecent Expressions with respect to the King, no true *Englishman* will call it so, tho' there may be some warm Expressions with respect to bad Ministers or Magistrates, which is a Sort of Language that every Man must make use of, who intends to write or speak with Effect to the People; a Sort of Language that has been made use of in all free States; and as it is coeval, it co-expires with Liberty.

Suppose then, for I may suppose it, because I am sure, it will not be applied to the present Time, that we had a set of Ministers who thought of nothing but indulging themselves in Ease, and enjoying the Plunder of their Country, under the name of Pensions, Salaries, Jobs, and Perquisites; and should allow their Country to be insulted; its Rights invaded, and its Trade interrupted in every Part of the World, rather than do any thing that might involve them in a War; and suppose a Gentleman well acquainted with all the Sources of our Trade, and with the proper Use we might make of our Naval Power, in order to excite his Countrymen to chuse such Representatives as would put an End to such pusillanimous Measures, should publish a true and genuine Account of all the Insults, Invasions, and Inroachments we had tamely suffered, and point out the fatal and certain Consequences of

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them;

them; such an Account, we may suppose, would be quickly prosecuted by Information, for I believe, it could not by Indictment; and suppose this Information should come to be tried by a Jury of Merchants who knew this Account of our Sufferings to be true in every particular, could they in their Conscience return the Defendant guilty of writing or publishing a False, Scandalous, Malicious, and Seditious Libel? Could they in their Conscience find the Defendant guilty of writing or publishing, and leave it to the Court to determine whether it was a Libel or no, after I have so clearly shewn, that upon such a Verdict the Court must necessarily determine it to be a Libel? For in this Case, as well as the Case of a Libel against a private Man, the Defendant would not be allowed to Justify, that is to say, to bring Witnesses for proving that he had asserted nothing but what was strictly true; because this would be a Sort of Inquiry into the Character and Conduct of Ministers who are no Parties to the Suit, nor supposed to be present at the Trial; and as the Judges must not without Proof suppose any Man guilty even of Neglect of Duty, they must suppose the Facts to be False, and consequently the Account so published to be a False, Scandalous, Malicious, and Seditious Libel, as it certainly would be, if the Facts were False, or grossly misrepresented.

In order to illustrate and establish the Doctrines I have advanced, I must go on with my Suppositions, but I hope, none of my Readers will imagine, that I mean to apply any of them to the present Time, for we are in no Danger

that ever any of the Cases I am to suppose, can happen during his present Majesty's Reign. Suppose then, that a Prime Minister should conceive a most unjust Hatred against any private Man, and should by underhand and hidden Methods oppress and intirely ruin him; it may be said perhaps, that this is impossible, because against such Attempts a Man might have Relief by Action, Prosecution, or Defence at Common Law. But a Man may be at once so far ruined as not to have wherewithal to procure Redress in the common Course of Justice. *Shakespeare* has long since told us, that *the Insolence of Office* is one of the Causes that might be sufficient for provoking a Man to put an End to himself; and when one goes there without Money to pay for Expedition, as well as the customary Fee, he may expect to meet with more Insolence than usual. This Method of Redress might be thus rendered impossible, and no Method left but that of an Application to Parliament; and there have been Instances of Complaints in Parliament, wherein the Petitioners alledged their being so totally ruined, that it was impossible for them to seek Redress at Common Law. Now if a new Parliament were at the Eve of being chosen, might not a Man in these Circumstances publish his Case with a very good Intention? Might not his Intention be, to prevail with his Countrymen not to chuse any of the Friends of such an enormous Oppressor? Certainly it might; and if his Case was strictly true, and notoriously known, or known by the Jury, to be so, they could not in Honour, or with a safe Conscience, bring him in guilty of publishing a False, Scandalous, Malicious, and Seditious Libel; nor could they bring

bring in such a Verdict as would lay the Court under a Necessity to declare it to be so.

Suppose again, that one of our Judges, who had a commanding Influence over the rest, (for such a Thing may be supposed, tho' at present it seems impossible) should conceive a Pique against any Practiser or Suitor, and should commit him for a pretended Contempt of Court, which was really no Contempt at all; and should resolve to detain him in Prison, until he confessed his Fault and begged Pardon; where could such an Oppressed Man find Relief? No where that I know of, but in Parliament. There probably he would resolve to apply as soon as the Parliament met; and might have Hopes that by a true Representation of his Case, he might get the People in their several Counties, Cities, and Boroughs, or at least in some of them, to send Instructions to their Representatives, to concur in an Address for removing such a vindictive and oppressive Judge. As this would add great Weight to his Complaint in Parliament, he might be induced by such Hopes to publish his Case; and tho' it contained nothing but the true Matter of Fact, tho' it was never so honestly and fairly stated, yet still an Information would probably be granted against him for publishing a False, Scandalous, Malicious, and Seditious Libel. What would be the Business and the Duty of the Jury upon this Trial? Would it not be their Business, would it not be their Duty, to make all possible Inquiry into the Truth of the Matter contained in what was thus prosecuted as a Libel? Would they not have a Right to send for and examine the Record of all the Proceedings relating to this Affair, in order from thence to determine with
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the more Certainty as to the Truth of the pretended Libel? And if this should be refused them, would they not from thence alone have Reason to presume, that the Libel was true in every Particular? If this Presumption should be supported by the general Voice, or by their own particular Knowledge, could they bring the Defendant in guilty of publishing a false Libel? Could they bring him in guilty of publishing a malicious or seditious Libel, when his Intention was so far from being malicious or seditious, that it was prudent, legal, and just? For every Man surely has a Right to complain to Parliament, when he can expect Redress no where else; and that Complaint he has a Right to endeavour to get supported in the strongest Manner our Constitution will admit of, which is that of an Application from the People in their several Capacities of Freeholders, Citizens and Burgeses.

Thus I have touched upon every Sort of Libel which we can suppose liable to be prosecuted by Indictment or Information before our Courts at Common Law; but there is another Sort of Libels which have always been prosecuted and punished in a different Manner, and that is Libels against either House of Parliament; for such a Libel is a high Contempt of the Authority of that House against which it is published, and has always been punished by the House as such. If such a Libel contained likewise some false, scandalous, malicious and seditious Matter against the King, his Crown and Dignity, that is to say, against the King, or any in Authority under him, or against the Measures of the Administration, the House would probably recommend it to be prosecuted

cuted at Common Law, because Sedition against the King is a higher Crime than a Contempt of either House. But if a Libel contained nothing but a Contempt; if it contained nothing but a false and malicious Representation of the Proceedings of either House, I believe, the House would neither desire nor allow it to be prosecuted at Common Law; because it would be a Sort of Confession, that they had not Power enough to vindicate their own Authority; and because it might furnish a Wicked Minister with a Method to get their Proceedings misrepresented and traduced with Impunity; for as soon as the Parliament was prorogued, he might get one of his Tools to publish a Libel against them, the Publisher presently prosecuted, and upon his pleading Guilty a small Fine and a few Days Imprisonment inflicted; and then when the Parliament met again it would be said, you cannot take any further Notice of this Affair, for the Publisher has been already punished, and our Constitution does not admit that a Man should be twice punished for one and the same Crime.

Another Reason is, because neither House, I believe, would chuse to submit their Proceedings to the Judgment of an inferior Court, or the Opinion of a Jury; for the Jury, as I have shewn, must consider, whether the Proceedings have been fairly or unfairly represented in that which they are, or are not to declare a false, scandalous, malicious, and seditious Libel; and though the Court cannot judge directly of the Veracity of the Libel, yet they may so far have Regard to the Opinion they have of it, as to make their Sentence more or less severe. Indeed,

deed, I do not see how it is possible to try such a Libel at Common Law ; because in all such Trials the Jury, I think, ought to have the Record of the Proceedings before them ; and no Common Law Court can command the Journals of either House to be brought before them ; nor would either House, I believe, chuse to have their Journals inspected and criticized by an inferior Court, and perhaps a Jury of low Mechanics. Besides, we know that though the Courts at Common Law are obliged to take Notice of, and to allow the Privilege of Parliament, they never assumed the Power to punish any Man for a Breach of Privilege. If a Lord of Parliament should be arrested and detained for Debt during the Recess, or if a Member of the House of Commons should be arrested within the Time of Privilege after the Prorogation, the Court from whence the Writ issued would be obliged to discharge the Prisoner, but they could not punish the Officer, or any of the other Persons concerned in the Arrest. This would be the Business of the House at the Beginning of the next Session, upon Complaint made to them ; and I fancy, they would not be pleased with any Judge that should take upon himself to usurp their Jurisdiction.

For these Reasons, though a malicious Misrepresentation of the Proceedings of either House be a most heinous Crime, and a Crime which ought to be severely punished, yet if there was nothing in it relating to the King or his Government, nor any thing that was any other way seditious, I much doubt, whether it could be punished, and whether the House would allow it to be

be punished by Information or Indictment. But if it should be prosecuted in this Way, and the Jury should be of Opinion, that it was a false, scandalous, malicious and seditious Libel, grossly and designedly misrepresenting the Proceedings of either House of Parliament, the Court would have a Right to pass Judgment; and if the Judges were of the same Opinion with the Jury, their Sentence, I believe, would be very severe. I have said, if the Jury were of Opinion, that it was a false, scandalous, malicious and seditious Libel, grossly and designedly misrepresenting the Proceedings of either House of Parliament, because as neither House ever pretended to Infallibility, the Jury may be of another Opinion, and have a Right, nay, are in Duty bound to return a Verdict according thereunto. For if either House should be guilty of an Act of Oppression, which is indeed hardly possible, unless Advantage should be taken of a thin House, I shall now shew, that the Person oppressed may publish his Case with a very good Intention, and if it be fairly and honestly stated, and the Proceedings faithfully related, it is so far from being criminal, that it may be necessary for his procuring Redress.

The Happiness of our Constitution consists in such a curious Mixture of Powers, that they easily and expeditiously co-operate for the Publick Good, but every one is so check'd, that an oppressed Subject may be protected and redressed by some of the other. If a Man be any way oppressed by the King's Ministers, he may have redress, and may get his Oppressors punished, by applying to one or both Houses of Parlia-

ment. If a Man should be oppressed by a leading Member in either House of Parliament, he may have redress, and may get his Persecutor punished, by applying to the King and the other House. And if he should in this Application be disappointed, he may apply to the whole People, who once at least in seven Years have an Opportunity to procure him Relief and Justice. If in a criminal Prosecution a Man should be unjustly condemned, he has the King to fly to for Mercy : If in a Civil Action the Judge should incline to do him Injustice, he may be protected by the Jury ; and if both should join in it, he may have Recourse to the House of Peers, who never yet could be accused of doing Injustice. And lastly, if a Jury should return an unjust Verdict, the Judges may order a new Trial. In short, by our Constitution, it is extremely easy and safe for a Man in Power to do right, extremely difficult and dangerous to do wrong. Is not this a Constitution worth contending for ?

Whoever considers the History of *Richard the Second's Shrewsbury* Parliament, or that of the Long Parliament in the Reign of *Charles the First*, must allow, that Parliaments may do wrong ; for they both did wrong, and in ways directly opposite : The former, by shewing too much Complaisance to the Crown, the latter, by shewing too little ; for Liberty, like Virtue, is always in the middle Path : The Right leads to absolute Monarchy, the Left to Tyranny either of one or a few ; and of these two Evils the last is by much the worst ; for an hereditary Monarch, if he has common Sense, will pursue the true Interest of his Country, and the People may be happy

happy under his Government, because as he has no Cause of Jealousy, he has no Motive to Cruelty: Whereas a Tyrant, or a Set of Tyrants, will always prefer their own particular Interest to that of their Country; and as they have great Cause of Jealousy, they have strong Motives to Cruelty. If then both Houses may do wrong, the Possibility of either's doing so must be admitted; and in order to shew the Rights and the Duty of an honest *English* Jury in case of an Information for a Libel against either, I shall suppose two Cases which never yet did exist, which, I hope, never will. Suppose that after a tedious and expensive Suit in Chancery, I should obtain a most just Decree for a large Estate, or a large Sum of Money, against which an Appeal should be lodged in the House of Lords, and this should come on to be heard within a few Days of the End of the Session, when the House is generally very thin. Suppose a Number of young Lords, instigated by one who was my sworn Enemy, or a near Relation to my Adversary, should purposely attend, and by a Majority reverse the Decree, without assigning any Reason, but some frivolous one in compliance with that Order of the House, which obliges every Lord who moves for reversing a Decree, to give some Reason for his Motion. In such a Case, should not I have a Right to seek for Redress in that legal Manner which would be most effectual? Should not I have a Right to seek for Justice against one who had done me such a notable and manifest Injury?

As to both the most effectual way would be, to get the House of Commons to adopt my Cause,

Cause, for they could not only get an Act of Parliament passed for restoring me to my Right, but might impeach the Lord who had brought such a Scandal upon the Justice of the Nation, And if I should resolve upon an Application for this Purpose, should not I have Occasion for all the Support I could procure from my Countrymen in their several Counties, Cities, and Boroughs? Suppose then that with this View I should publish a just and true, but spirited Account of my Cause, and of the Proceedings in the House of Lords against me: Would there be any Malice, would there be any Sedition in such a Publication? Is it not lawful for the People in their several Counties, Cities, and Boroughs to petition, to instruct their Representatives in Parliament? And if this be lawful can there be any Sedition in applying for it? Yet nevertheless, my Enemies by their Interest in the House of Lords, might get the Account I had published voted to be a false, scandalous, malicious, and seditious Libel; and an Address to the King to order his Attorney-General to prosecute the Author; for many Lords who would not have concurred in the first Injustice that was done me, might then think it necessary for preserving the Honour and Dignity of their Assembly, to support what had been done. At the same Time I might find myself disappointed in the Countenance I expected, and had a Right to expect, both from the House of Commons, and from my Countrymen; and at last might find myself involved in a Prosecution by Information at the Suit of the Crown, as being the Author of a false, scandalous, malicious and seditious Libel, though there was nothing contained in it but what was notoriously known

known to be true, nor any Expression but what was necessary for representing my Case, in a proper and feeling Manner, to those who, by our Constitution, have a Right to interpose in procuring Redress and Justice to any Fellow-Subject that has been injured.

Upon such an Information what would be the Duty of an honest resolute *English* Jury at the Trial? They could not perhaps have the Journals of the House before them, to examine in an authentick Manner, whether the Matter of the pretended Libel was true or false: They could not call it false, because every Article of it was notoriously known to be true: They could not say it was malicious in a Man who had been injured, to seek Redress in that way which he thought would be most effectual: They could not say he had sought for Redress in a seditious Manner, because he had neither desired, nor designed, that the People should do any thing but what they had a Right to do by our Constitution. Would not the Jury then be bound, both in Honour and Conscience, to bring in the Verdict, *Not Guilty*? By that Verdict they do not say, that the Defendant was not guilty of the simple and innocent Fact of writing or publishing: They only say, that he was not guilty of the compound and criminal Fact of writing or publishing a false, scandalous, malicious, and seditious Libel. For that is the Fact laid in the Information, and the Fact upon which they are to give their Judgment.

Now with regard to the House of Commons, as that House is no more Infalible than the
other,

other, and as being more numerous is more liable to be governed by Faction, we may suppose, that they may be [wrong in their Proceedings, and even that they may commit Injustice in that only Right which they have the sole Power to determine: I mean the Right of Election, or the Right of Voting at an Election. I shall therefore suppose, that at an Election I should be fairly and legally chosen, and returned one of the Representatives for any County, City, or Borough, but upon a Petition should be, by a Faction in that House, declared unduly elected, and the Petitioner, without the least Colour of Right, declared duly Elected. As this would be an Injury done to my Constituents as well as to myself, and as it would be a most dangerous Inroad upon our Constitution, it is really an Injury done to the Nation. Should not I then have a Right to take the most effectual legal Method I could think of for procuring Redress to myself, to my Constituents, to my Country? Can any one point out a more effectual Method than that of procuring Petitions to the King from as many Counties, Cities, and Boroughs as possible, praying that he would dissolve the Parliament? Could there be any Malice, could there be any Sedition in such an Attempt? Surely none. If so, there could then be neither Malice nor Sedition in my taking the most proper Method for attaining the End I aim at, which certainly would be, the Publication of a full and true Account of my Election, and of the Proceedings of the House relating to it. I might fail in my Attempt; but that surely does not render the Attempt Criminal, if it was not so before. However, as Faction is always the more violent, the more

more it is in the Wrong ; the Account I had published would probably be voted a False, Scandalous, Malicious, and Seditious Libel, by the House in the next Session ; and perhaps an Address to the King to order his Attorney-General to prosecute the Author. Even the King may sometimes allow himself to be carried along with the Stream he cannot stem ; and it is generally most prudent to do so, because the Impetuosity of Faction, if you give it Vent, soon exhausts itself, and the King may then easily find an Opportunity to do Justice to those that have been injured.

Thus an Information might be filed against me, of course full of hard Words, and setting this my legal Attempt in the most criminal Light. Here again the Jury upon the Trial could not perhaps have the Journals of the House before them, in order to examine, in an authentick Manner, whether the Account I had published was True or False. But supposing that there was not in this Account any Fact, or any Proceeding related, but what was notoriously known to be true, nor any Expression but what was absolutely necessary in an Address to the People ; could the Jury upon their Oaths call that False which was notoriously known to be True ? Could they think, that it was Malicious in a Man to seek Redress for a Wrong done not only to himself and his Constituents, but to his Country ? Could they say it was Seditious to aim at persuading the People to Petition the King to Dissolve the Parliament ; which is a Right they have by our Constitution, and a Right they may exercise as often as they think it necessary ? Therefore, in this Case
as

as well as the former, I must think, that the Jury would be bound both in Honour and Conscience to bring in their Verdict, *Not Guilty*; and an honest resolute *English* Jury would certainly do so, in spite of any Menaces that might be thrown out by the Leaders of the Faction; for even the Parliament itself never yet pretended to punish a Jury for a Verdict brought in upon Oath, and against which no Corruption or illegal Practice could be alledged. If the Parliament had ever pretended to such a Right, it would certainly have been exercised, by that complaisant Session of Parliament which met soon after the Accession of *James* the II^d, against the *Ignoramus* Grand Juries of *London* who so much obstructed the Designs of the Court, towards the End of the preceding Reign. But nothing of this kind is ever to be apprehended from a free and uncorrupt Parliament, because it would be a total subversion of our Constitution; and by rendering Parliaments odious to the People, would soon put it in the Power of the King to govern without so much as the Shadow of a Parliament.

I have now fully explained what I take to be the Duty, and what, I hope, will always be the Conduct of Juries upon Trials for all Sorts of Libels. A Libel, either of a publick or private Nature, that is really False, Scandalous, and Malicious, deserves the severest Punishment; and for the condign Punishment of such, I am persuaded, every Jury will concur as often as the Proof is clear. In order to come at that Punishment, there is therefore no Occasion for divesting Juries of that Power which they have always had by our Constitution, and which is our chief Bulwark against what I may call *Legal*

Oppression; which was the Sort of *Oppression* made Use of by the first *Roman* Emperors, against those who dared to oppose the cruel Commands of a whimsical Sovereign or rapacious Prime Minister, either in the Senate, or at the Election of any Senator.

The Power I mean is, that of founding their Verdict upon their own Knowledge; for this is now openly struck at in the Case of Libels, and should this Attempt prevail, we should soon be told, that Juries are always bound to return a Verdict according to the Evidence of the Witnesses, which is all an Arbitrary Court could want for getting an Innocent Man convicted of High Treason: *Delatores* or Informers would then become as useful, and perhaps as much employed here, as they ever were at *Rome*; for such venomous Weeds, if cultivated, will grow up in any Soil, in any Climate; but never will be cultivated, because useless, in a Country where no Man can be condemned but by the Voice of an honest unbiassed Jury.

Therefore our Juries will, I hope, continue to assert their Right, and perform their Duty in the Case of Libels, as well as every other; and when they are convinced, that there is nothing False or Malicious in what is prosecuted as a Libel, I hope, they will by their Verdict acquit the Defendant; for if a Man has behaved so as to convince a whole Neighbourhood of his having been guilty of scandalous Actions, he deserves to be exposed; and Wick-

edness in this Age, I am sure, requires all the Checks it can be kept under.

But from the Violence now manifested against every thing that may look like a Libel, either Publick or Private, one would think, that our Quality had lately begun to practise some new Sort of Crime, of a very profitable or pleasant Nature, for which they cannot be prosecuted by Law, and are therefore afraid of nothing but of having their Practices exposed and recorded by Writing or Printing, or by Signs or Pictures.

If any such Crime be now more frequently practised than formerly, it is so far from being an Argument for establishing the Doctrine, of it's being no way material, whether the Facts set forth in the Libel be true or false, that it is a strong Argument for altering our Law, by making it the same with respect to an Indictment or Information, as it is with respect to an Action of the Case, or a *Scandalum Magnatum*, for publishing an infamous Libel, that is to say, by giving the Defendant leave to justify in the one Case as well as the other; for though the Person libelled be no Party to the Suit upon an Information or Indictment, yet we know, that the Prosecution is always set on Foot at his Desire, and with his Concurrence.

I shall conclude with observing, that with regard to the Truth or Falshood of what is called a Libel, there is a very material Difference between those I have called private, and those I

have called publick Libels : The Conduct of Ministers and the Measures of an Administration affect the whole Nation, therefore the whole People have an Interest in their being right, and if wrong they can neither be rectified nor punished by any Prosecution at Common Law.

Besides, the Man who comes at the Knowledge of their being wrong, is under a much higher Obligation to publish them to the World, than the Man who comes at the Knowledge of any Piece of Wickedness in a private Man ; therefore it is ridiculous to say, that the Jury are not to consider, whether the Facts set forth in a publick Libel be true or false, when, if true, the Publication of them was so far from being a Crime, that it was a Duty.

As to the Proceedings of the House of Commons, surely, the People have a Right to be truly informed as to the Proceedings of their Representatives, that they may judge, whether upon a new Election they shall again trust their Liberties and Properties to the same Gentlemen. Can it then be a Crime to give the People that Information which they have a Right to ? Can a Jury upon their Oaths find any Man guilty of a Crime, if they are convinced, from their own Knowledge, or from the Notoriety of the Fact, that he has been guilty of no Crime ?

Such Doctrines may be covered and disguised by a Multiplicity of Words, but when stated in a concise Manner, they appear in their true

Colours. And our Histories shew, that the Proceedings of the House of Commons have often been very freely treated in Papers and Pamphlets published as soon as the Session was up, of which we have two very remarkable Instances: One called *The Subjects Right of Petitioning*, published in 1701, against the Proceedings of the House upon the famous *Kentish* Petition; and the other was wrote about ten Years afterwards against the Proceedings of the preceding Session, by a Gentleman, then in the Tower, who, not many Years after, came to be a very great Minister, and who certainly understood the Nature of our Constitution as well as any Man in the Kingdom.

Yet I never heard that these, or any such Pamphlets or Papers were ever prosecuted by Indictment or Information; and the Reason I must presume to be, that the Courtiers did not think, they could get an *English* Jury to convict the supposed Libeller; for that Courtiers ever wanted *the Will* to punish such an Offender, I cannot in the least question. But in those Days it was not discovered, that the Publication of a *true Libel* is a greater Crime than the Publication of a *false one*, that Juries have nothing to do with the Proof of those Circumstances *which alone* make the Crime they are to try, or that they are obliged to call that a *false Libel* which they know to be a *true one*. These are Discoveries reserved for the Ingenuity of the present Age; but such, I hope, as will never be established by Practice.

I have

I have somewhere read that in *China* they had, and I believe still have an Office at Court, appointed on Purpose to keep a Record of the Actions and Behaviour of their reigning Monarch, either in his publick or private Capacity, which Office is by their Constitution and Religion so privileged, that no Man can look into their Records of the Monarch then upon the Throne, nor can the Successor punish or reward them for what they have recorded of his Predecessor; and as they are thus without Fear of Punishment or Hope of Reward, they have generally, for the Sake of their own Character, been pretty impartial.

If this wise People were told, that in this Country we have by our Laws rendered sacred the Character not only of High Criminals who are above the Law, but of every little pilfering Rogue who has Cunning enough to guard against a Prosecution, or Riches enough to buy it off; nay, that we not only protect their Character while alive, but their Memory after they are dead, even to the tenth Generation for what I know, for I have never heard of any Limitation. I say, if the People of *China* were told this, I know what they would think of our Lawgivers. They know that the daily Prayer even of the most abandoned Rogue, or profligate Villain, is,

*Da mihi fallere, da iusto, sanctoque videri :
Noëtem peccatis, et fraudibus objice nubem.*

And if our modern Doctrines with regard to Libels were once established, I should then think
that

that we had done all that was in our Power to-
wards giving every Man Hopes of having this
his impudent Petition complied with. Whe-
ther this would contribute towards rendering
Mankind more virtuous or more honest I shall
leave to the Judgment of every Reader, and let
him from thence determine, whether he will con-
tribute his Mite towards the Establishment of
such Doctrines.

F I N I S.



